Filed 11/2/12 In re K.Y. CA1/1

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

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| In re K.Y., a Person Coming Under the Juvenile Court Law. | |
| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>K.Y.,<br>Defendant and Appellant. | A133909<br><br>(Contra Costa County Super. Ct. No. J11-01161) |

Defendant K.Y. participated in a burglary of her former best friend's home in Alamo, stealing many valuable items as well as several credit cards that were later used to make fraudulent transactions. After her arrest, a delinquency petition was filed alleging she had committed one count of felony burglary and two counts of felony commercial burglary. The juvenile court sustained the petition and required her to participate in a residential program before being released to her father on probation. On appeal she contends the court erred in failing to transfer the case to her county of residency prior to disposition. She also claims the court failed to make an adequate finding as to the two "wobbler" counts, and she challenges certain of her probation conditions. We affirm.

## FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Defendant was born in April 1995.

Perry A. and his family went on a weekend trip, leaving their house in Alamo unoccupied from 10:00 or 11:00 a.m. Saturday morning, July 23, 2011, until his return

around 4:00 p.m. on Monday, July 25, 2011. Upon his return, he found the house had been broken into and almost all the rooms had been ransacked. A glass door that leads into the master bedroom had been broken with a brick. Watches, jewelry, expensive purses, iPhones, computers, televisions, and piggy banks with money were among the items that were taken, along with several credit cards and a checkbook. The total dollar value of the property that was taken was estimated to be over $100,000. After the burglary he became aware that unauthorized charges were being made to his credit cards, including $3,000 that was charged to a Home Depot credit card. At some point, a detective showed him a surveillance video of some individuals in a store. He recognized defendant and defendant's sister. At that time, defendant was his stepdaughter's best friend.

Detective Justin Varady interviewed Perry A. and learned of the fraudulent credit card transactions. Varady went to the stores where the cards were used to see if they had surveillance video that corresponded to the dates and times of the fraudulent transactions. One of the stores is called Charlotte Russe, located in Tracy. He obtained a video from the store showing a transaction in which one of Perry A.'s cards was used. The video showed three female subjects attempt to purchase items at the counter with the credit card. The transaction did not go through and after two more unsuccessful attempts, the subjects left the store without any merchandise. Varady showed the video to Perry A., who identified defendant and her 18-year-old sister C.Y. Defendant had placed items on the counter and C.Y. took out the card and attempted to process it. When he showed the video to Perry A.'s stepdaughter J.S., she was able to identify all three female subjects. Varady obtained surveillance video of a transaction involving the same credit card from a Target store also located in Tracy. The video was recorded the same day as the one at the Charlotte Russe store. Again, J.S. identified the same three females.

Varady was able to locate defendant's mother's house. J.S. was familiar with the residence as she had stayed there overnight several times. He obtained a search warrant. When officers served the search warrant, numerous people were in the home, including defendant, her sister, her stepbrother Devin M., her mother, and her mother's boyfriend.

These five individuals were taken into custody. Three females, one of whom had a child, were not arrested. A subsequent search of the house uncovered items that were reported as stolen from Perry A.'s home, as well as drugs. Stolen property was found in Devin's room, defendant's mother's room, the room that defendant and her sister shared, as well as in the kitchen and the garage. A gun, a stolen laptop computer, a Louis Vuitton duffle bag, and a stolen wallet were found in Devin's bedroom. The wallet had his identification in it.

Varady attempted to interview defendant after she was transported to his office. He read the *Miranda*[1] admonitions to her and she stated that she understood them. She did not invoke her rights, but to every question he asked she either gave a single-word answer or she just laughed. She initially stated that she had obtained the credit cards from her mother who told her to use them to get whatever she wanted. When he asked her about the burglary of Perry A.'s home, she said she had no knowledge of it. She then began laughing and did not answer any more questions. Later, he put defendant's mother in the interview room and left them alone. Their interaction was recorded on video. Defendant's mother told her the charge was serious and defendant laughed and said that she "doesn't give a fuck." She then told her mother that J.S. had asked her to burglarize the home because she was angry with her parents. She said J.S. also told her where all the valuable property was kept.

J.S. had been friends with defendant since they were in middle school. She had spent the night at defendant's mother's house about five times. Defendant had spent the night at her house many times in the past, and was last there a couple of days before J.S.'s family left on vacation. On that occasion, J.S. told defendant that the whole family would be away.[2] Later, J.S. reviewed the surveillance videotapes from the two stores in Tracy and identified defendant, C.Y., and T.S.

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[1] *Miranda v. Arizona* (1966) 384 U.S. 436.

[2] At the jurisdictional hearing J.S. denied being upset with her parents. She also denied having told defendant where the valuables were kept, or having asked her to burglarize the house while the family was away.

T.S. spent the night at defendant's mother's house on July 24, 2011.[3] When she arrived that day, she noticed two to four Louis Vuitton bags in Devin's room. When she asked defendant about the bags, defendant told her she had gone with Devin and his friend to J.S.'s home and they had broken into the house. Defendant admitted she showed the two males where the valuables were kept. Subsequently, T.S. went to the mall in Tracy with defendant, C.Y., defendant's mother, and the mother's boyfriend. She went with defendant and C.Y. to the Charlotte Russe and Target stores. The three of them picked out items for purchase. T.S. did not see the first transaction because she had left to use the restroom. At the Target store, C.Y. tried to use the credit card but it was declined.

On August 19, 2011, a wardship petition (Welf. & Inst. Code, § 602)[4] was filed alleging defendant had committed felony first degree residential burglary (Pen. Code, § 459/460, subd. (a)) (Count One), along with two counts of felony second degree commercial burglary (Pen. Code, § 459/460, subd. (b)) (Counts Two and Three).

On August 22, 2011, the juvenile court ordered defendant detained in juvenile hall.

On September 16, 2011, defendant was released to her father on juvenile electronic monitoring. She was ordered to have no contact with her mother.

On October 14, 2011, after a contested jurisdictional hearing, the petition was sustained as to all three counts. Defendant was again ordered detained in juvenile hall. Her motion to transfer the case to Alameda County was denied, subject to renewal at the dispositional hearing. The juvenile court lifted the no-contact order with defendant's mother, allowing visitation.

Prior to the dispositional hearing, a probation officer prepared a report containing an assessment of defendant and recommendations for disposition. The report

[3] T.S. testified under complete immunity from prosecution.

[4] All further statutory references are to the Welfare and Institutions Code except as otherwise indicated.

recommended she be placed on home supervision for a period of 90 days in the residence of her father.

At the dispositional hearing on October 28, 2011, the juvenile court made defendant a ward of the court and removed her from the custody of her parents. Maximum custodial time was set at 7 years 48 days. The court ordered her committed to the Girls in Motion program, and directed that on release from the program she reside in her father's home on probation. Conditions of probation included requirements that she have only supervised contact with her mother, not visit her mother's home, and not associate with her brother or sister.

On May 4, 2012, the juvenile court modified defendant's probation to permit her to associate with her sister.

## DISCUSSION

### *I. Transfer Request*

### *A. Background*

Defendant claims the juvenile court failed to exercise its discretion as to whether it was in her best interests to transfer her case to Alameda County. As noted above, at the close of the contested jurisdictional hearing defendant's counsel requested that the case be transferred to Alameda County for disposition. The juvenile court initially indicated that it would "make that determination at disposition. Because I don't know where she lives now."[5] Immediately thereafter the court elicited from her father that she lived with him in Fremont, and her mother lived in Livermore. Counsel renewed the transfer request, noting defendant alternately resided with her parents, both of whom lived in Alameda County. The court responded, "That's true, but I heard this entire contest. And I'm not going to send somebody— not sending a case for disposition and have a judge who did not hear the contest, does not know the entirety of the situation, to do the disposition. That is not fair, period. It's not justice." Counsel reminded the court that the Welfare and Institutions Code authorizes transfers prior to disposition. The court

[5] J.S. testified that defendant told her she stayed with her mother half the time and with her father the other half.

stated: "The court can do it at disposition if they find it [*sic*] the best interest or before disposition, and I'm not finding it in the best interest at this time. And I may not, because it can be where the court—where the court hears—where the crime occurred." Counsel asked for a court date in advance of the dispositional hearing to address the transfer issue. The court replied it would not transfer out prior to disposition. Counsel indicated she was asking for the time in order to make a record. The court stated, "You can make the record at disposition, period."

Because the residential burglary occurred in Contra Costa County, venue in that county was proper. Section 651 provides, "Proceedings under this chapter may be commenced either in the juvenile court for the county in which a minor resides, or in which a minor is found, or in which the circumstances exist *or acts take place to bring a minor within the provisions of Section 601 or Section 602*." (Italics added.) Transfer to the minor's county of residence is not mandatory. Section 750 provides, in part: "Whenever a petition is filed in the juvenile court of a county other than the residence of the person named in the petition . . . the entire case *may* be transferred to the juvenile court of the county wherein such person then resides at any time after the court has made a finding of the facts upon which it has exercised its jurisdiction over such minor, and the juvenile court of the county wherein such person then resides shall take jurisdiction of the case upon the receipt and filing with it of such finding of the facts and an order transferring the case." (Italics added.)[6] If a minor's residence is found to be in another county, the juvenile court may order a transfer provided that such transfer would be in the minor's best interest. California Rules of Court, rule 5.610(e) provides: "After the court determines the identity and residence of the child's custodian, the court must consider whether transfer of the case would be in the child's best interest. The court may not transfer the case unless it determines that the transfer will protect or further the child's best interest."

[6] For purposes of this provision, "the residence of the minor is the residence of the person legally entitled to custody of the minor." (*In re Judson W.* (1986) 185 Cal.App.3d 838, 843.)

### *B. The Claim Has Been Forfeited*

The People assert defendant has forfeited review of the transfer issue by failing to renew her motion at the dispositional hearing.[7] "A fundamental tenet of our system of justice is the well-established principle that a party's failure to assert error or otherwise preserve an issue at trial ordinarily will result in forfeiture of an appeal of that issue. ' "The purpose of the general doctrine of waiver is to encourage a defendant to bring errors to the attention of the trial court, so that they may be corrected or avoided and a fair trial had." ' [Citations.]" (*People v. McKinnon* (2011) 52 Cal.4th 610, 636, fn. omitted.)

As noted above, the juvenile court denied the transfer request that was made immediately after the jurisdictional hearing. The court did offer to consider a transfer at the dispositional hearing, set to occur in 10 court days. The court also stated that defendant's counsel would be able to make a record concerning the initial denial of the transfer request at the dispositional hearing. However, at the dispositional hearing, counsel did not renew the earlier transfer request. Instead, she acknowledged that the court had its reasons for resisting transfer at the time the initial request was made and did not object to the case proceeding to disposition: "I guess the one request that I hadn't made yet is that the court consider, after—*well, I do understand why Your Honor wanted to keep this case rather than transferring it out*—our request is that the court transfer to Alameda County for supervision *following whatever either custodial or home supervision program the court deems appropriate*." (Italics added.) After the court ordered

[7] We also encourage appellate counsel to consider the practical ramifications of raising this issue on appeal, given that defendant has already completed the Girls in Motion program and, it appears, is now living with her father under terms of probation. At the time defendant's opening brief on appeal was filed, she had already completed several months of the program. She did complete the program prior to the filing of her reply brief, and the juvenile court had already ordered the case to be transferred after restitution was clarified. Assuming we were to find the court had abused its discretion in failing to transfer the case prior to disposition, what remedy would we order? To have the case transferred to Alameda County now so that a new judge might authorize a new and different disposition for defendant? The issue is essentially moot at this point and, thus, the appeal, as a practical matter, serves no purpose.

defendant to participate in the Girls in Motion program, it stated that when she was released, "we can then decide whether or not we should transfer the case."

Defendant claims any further reiteration of the transfer request by her counsel on the date of the dispositional hearing would have been futile, therefore her failure to raise the issue should be excused. (See, e.g., *People v. Welch* (1993) 5 Cal.4th 228, 237 ["Reviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile . . . ."].) Here, defendant's counsel did not merely fail to raise the issue. Instead, she expressly conceded that the juvenile court had valid grounds for refusing to grant the transfer request, and she modified the earlier request to allow the transfer to occur after defendant completed the Girls in Motion program. This is a classic instance of forfeiture. We conclude the issue was not preserved for review.

***C. The Juvenile Court Properly Exercised Its Discretion***

Even if defendant's claim were not forfeited, we would find the juvenile court did not abuse its discretion in concluding that transferring the matter to Alameda County prior to the dispositional hearing would not have been in her best interest.[8]

With respect to inter-county transfers, the needs of the minor control the outcome. (*In re J. C., supra,* 104 Cal.App.4th 984, 992–993; see also *In re R. D.* (2008) 163 Cal.App.4th 679, 685–687.) Here, the court was faced with a very complex matter involving a burglary in Contra Costa County, stolen property in Alameda County, commercial burglaries in San Joaquin County, and the fact that defendant's mother and members of her mother's household appeared to be potential coconspirators. Given the unusual family dynamics in this case, it is understandable that the court did not perceive a benefit in transferring the matter to the county of defendant's parents' residences immediately after the jurisdictional hearing. Significantly, the judge was the only judicial

[8] "The standard of review is abuse of discretion. [Citations.] Under this standard, we must uphold the [] court's finding unless it 'exceed[s] the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court.' [Citation.]" (*In re J. C.* (2002) 104 Cal.App.4th 984, 993.)

officer fully familiar with the facts and the inter-family relationships. It would have been a clear waste of judicial resources to immediately have sent the matter to Alameda County, triggering substantial re-learning of the case by a new judicial officer. The resulting delay would not have benefited defendant. Moreover, on appeal she has not clearly articulated any benefit to her that would have resulted from such a transfer other than noting the obvious, which is that Alameda County was her county of residence. We find no error.

***II. Wobbler Offenses***

Defendant claims the juvenile court erred by failing to expressly declare whether the sustained wobbler offenses constituted misdemeanors or felonies. At issue here is that portion of section 702 which states: "If the minor is found to have committed an offense which would in the case of an adult be punishable alternatively as a felony or a misdemeanor, the court shall declare the offense to be a misdemeanor or felony." Section 702 has been interpreted to require an express, formal finding by the juvenile court: "[N]either the pleading, the minute order, nor the setting of a felony-level period of physical confinement may substitute for a declaration by the juvenile court as to whether an offense is a misdemeanor or felony." (*In re Manzy W.* (1997) 14 Cal.4th 1199, 1208.) Where a juvenile court fails to make such a designation, the matter need not be remanded if the record shows that the juvenile court was aware of and exercised its discretion to determine the felony or misdemeanor nature of a wobbler. (*Id.* at p. 1209.)

Here, the juvenile court in sustaining the petition described Counts Two and Three each as "a felony." Additionally, at the dispositional hearing the court stated: "I just want to make sure I put on the record the sustained charges: 459-460(a), residential burglary, felony; 459-460(b) second degree commercial burglary, felony; and 459-460(b) second degree commercial burglary, felony." The declaration that the crimes were felonies is enough. No further details were required of the court.[9] (See *In re Michael S.* (1983) 141

[9] The juvenile court's statements distinguish this case from *In re Kenneth H.* (1983) 33 Cal.3d 616 upon which defendant relies "Here, . . . the crucial fact is that the court *did not* state at any of the hearings that it found the burglary to be a felony." (*Id.* at p. 620, italics added.)

Cal.App.3d 814, 818; *In re Robert V.* (1982) 132 Cal.App.3d 815, 823.) Additionally, even if we were to find that the trial court committed *Manzy W.* error, we would find the error harmless under the facts of this case.

***III. Probation Condition***

Finally, defendant asserts the probation condition barring her from contact with an "unspecified" brother is vague and that her counsel rendered ineffective assistance by failing to object or request clarification. The challenge is frivolous.

At the dispositional hearing, the juvenile court ordered as a condition of probation that defendant not associate with her sister and brother. The probation report reflects that she has two male siblings, Devin and Ritchie M. In ordering her to refrain from contact with her brother, the court did not, at that specific moment, include his first name. Based on this, defendant claims "The condition is unconstitutionally vague, for it fails to give [her] notice as to whether she will be in violation of probation if she chooses, for example, to associate with Ritchie [M]."

Again, the doctrine of forfeiture applies as no objection was made to the probation condition at the dispositional hearing. As the People correctly note, defendant has not properly raised a facial challenge to the contested condition. Instead, hers is an as-applied challenge in that it depends on a factual determination as to which brother the condition applies. Significantly, she does not seriously contend that the order to stay away from Devin violates her constitutional rights. Rather, she claims the condition is ambiguous because it does not reference him by name. Thus, the condition does not constitute an "unauthorized sentence" in that it *can* be lawfully imposed with respect to Devin, and, to the extent it needs correction, such correction necessarily would have to be made with reference to factual findings in the record, namely, that she has two brothers, one of whom had no connection to her delinquent behavior.[10] (See *In re Sheena K.* (2007) 40 Cal.4th 875, 887 [narrow exception to forfeiture rule applies to "unauthorized" sentences, namely, sentences that "cannot 'lawfully be imposed under *any* circumstance

[10] As noted above, on May 4, 2012, the juvenile court removed the stay-away order with respect to defendant's sister C.Y. Thus, her appeal is moot with respect to C.Y.

in the particular case' [citation]" or that evidence "obvious legal error . . . that is 'correctable *without referring to factual findings* in the record or remanding for further findings' . . . ." (Italics added.)].)

In any event, the record amply demonstrates that the juvenile court had Devin in mind when it ordered defendant to stay away from her "brother."[11] Understood as such, the order is completely reasonable. Thus, we need not determine whether failure to object to the condition as imposed by the trial court could be viewed as ineffective assistance of counsel. The state, when it asserts jurisdiction over a minor, stands in the shoes of the minor's parents (*In re Antonio R.* (2000) 78 Cal.App.4th 937, 941), thereby occupying a "unique role . . . in caring for the minor's well-being . . . ." (*In re Laylah K.* (1991) 229 Cal.App.3d 1496, 1500.) In keeping with this role, section 730, subdivision (b), provides that the court may impose "any and all reasonable [probation] conditions that it may determine fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced." Here, the juvenile court's ruling was clearly aimed at keeping defendant away from Devin, the sibling who helped her commit the burglary. There is no apparent legal peril here when she associates with any other brother. The non-association provision applies to Devin, a criminal partner who is older than defendant and who the court reasonably believed could induce her to commit violations of probation.[12]

**DISPOSITION**

The orders are affirmed.

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[11] We also note the probation report specifically states that Ritchie M. lived independently in Manteca and thus was not an active member of defendant's mother's problematic household.

[12] According to the probation report, even defendant considered Devin to be a bad influence on her.

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Dondero, J.

We concur:

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Marchiano, P. J.

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Margulies, J.